No. 84-294 (3)

Office - Supreme Court, U.S.
FILED
SEP 26 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENVIROTECH CORPORATION

and

ENERGY FUELS NUCLEAR, INC.,

Petitioners,

—v.—

AMSTAR CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GERALD W. GRIFFIN
Counsel of Record
NORMAN H. ZIVIN
COOPER, DUNHAM, CLARK, GRIFFIN
& MORAN
30 Rockefeller Plaza
New York, New York 10112
(212) 977-9550

DONALD B. HOLBROOK
JONES, WALDO, HOLBROOK
& MCDONOUGH
170 South Main Street
Salt Lake City, Utah 84111
(801) 521-3200

Attorneys for Respondent
AMSTAR CORPORATION

September 24, 1984

BEST AVAILABLE COPY

STATEMENT PURSUANT TO RULE 28.1

Respondent Amstar Corporation is a wholly-owned subsidiary of Amstar Holdings, Inc. Amstar's subsidiaries all are wholly-owned by Amstar.

TABLE OF CONTENTS

PAGE

STATEMENT PURSUANT TO RULE 28.1 i

TABLE OF AUTHORITIES v

COMMENTS REGARDING PETITIONER'S STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. The Federal Circuit Applied The "Clearly Erroneous" Rule, As Properly Interpreted, In This Case And Has Regularly Applied The Rule In Other Cases 5

II. The District Court's Findings Of Fact Were Based On An Incorrect Interpretation Of The Law, And To The Extent Made, Were Held By The Federal Circuit To Be Irrelevant Or Clearly Erroneous ... 9

III. No Remand For Further Findings Of Fact Was Necessary Because Infringement Was Clear On The Record 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases PAGE

ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572 (C.A.F.C. 1984) 7

Amstar Corp. v. Envirotech Corp., 730 F.2d 1476 (C.A.F.C. 1984) ..... *passim*

Caterpillar Tractor Co. v. Berco, S.p.A., 714 F.2d 1110 (C.A.F.C. 1983) 7

Cochrane v. Deener, 94 U.S. 780 (1876) 10, 12

Coupe v. Royer, 155 U.S. 565 (1895) 8

Fromson v. Advance Offset Plate, Inc., 720 F.2d 1565 (C.A.F.C. 1983) 9

Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605 (1950) 10

Jones v. Hardy, 727 F.2d 1524 (C.A.F.C. 1984) 14

Preemption Devices, Inc. v. Minnesota Mining & Mfg. Co., 732 F.2d 903 (C.A.F.C. 1984) 6

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 8, 12

Raytheon Corp. v. Roper Corp., 724 F.2d 951 (C.A.F.C. 1983) 7

Schenck A.G. v. Nortron Corp., 713 F.2d 782 (C.A.F.C. 1983) 7

SSIH Equipment, S.A. v. International Trade Commission, 718 F.2d 365 (C.A.F.C. 1983) 8

Thomas & Betts Corp. v. Litton Systems, Inc., 720 F.2d 1572 (C.A.F.C. 1983) 7

Winans v. Denmead, 56 U.S. 330 (1853) 8

PAGE

Statute

Federal Court Improvement Act of 1982 6

Rule

Rule 52(a) Federal Rules of Civil Procedure 4, 5

Other

Federal Judicial Workload Statistics (period ending March 31, 1984) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-294

ENVIROTECH CORPORATION

and

ENERGY FUELS NUCLEAR, INC.,

Petitioners,

—v.—

AMSTAR CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Respondent AMSTAR CORPORATION submits that a writ of certiorari should not issue to review the decision of the Court of Appeals for the Federal Circuit, dated March 27, 1984, as amended April 16, 1984.

COMMENTS REGARDING PETITIONER'S STATEMENT OF THE CASE

Envirotech's Statement of the Case (Petition pp. 2-8) contains serious errors and omissions. Envirotech does not argue that its originally made and sold equipment did not infringe the Eis patent in suit.[1] Its Petition is limited to so-called "modi-

1 The original equipment was found by the District Court to follow "too closely the outline first propounded by Eis" (A-66) and by the Court of Appeals as "literal infringements" (A-11).

fied" equipment (p. 3, f.n. 2). Envirotech does not dispute validity of the Eis patent. Instead Envirotech presents misleading arguments of the kind which led to the "clearly erroneous" District Court decision. Even if Envirotech's position is sustained, it does not avoid liability to Amstar in this case since it still has infringed the valid Eis patent.

The principal error in the Petition's Statement of the Case lies in Envirotech's discussion of the meaning of the term "unitary substantially horizontal baffle means". The baffle means is an element of apparatus claim 9 of the Eis patent. Claim 9 specifies that the baffle means arrests and alters the direction of flow of incoming slurry. Claim 9 does not require that the baffle means be either stationery or *flat*. The baffle means may be fixed or it may rotate. It may be smooth or it may have blades on its upper surface. Process claims 1 and 8 of the Eis patent do not require any baffle means (A-86-88). Those process claims recite the arresting and outward displacement of incoming slurry by unspecified means. The baffle means is simply one example of a structure which might perform that function.

It is an elementary tenet of patent law that the claims define the invention of the patent. If the claims specify the use of a particular element, it is required that the element or its equivalent be used to make out an infringement. If the claims do not specify the element, then its presence or absence in the accused device is irrelevant. In its attempt to escape infringement of claims 1 and 8, Envirotech tries to read the "baffle means" recited in apparatus claim 9 into process claims 1 and 8. Envirotech then argues that its equipment either does not have a baffle means or has a baffle means different from that defined by claim 9. Actually, it is not clear what Envirotech contends, as its Petition never states that its equipment has no baffle means. Even if its equipment does not contain a baffle means (and it surely does), its presence or absence does not affect Envirotech's infringement of claims 1 and 8. The argument is relevant only to claim 9.

Envirotech repeatedly states that it does not infringe claim 9 because the District Court made findings of fact that Envirotech's equipment either has no baffle means, or has baffle means with a dissimilar function (Petition pp. 4, 5, 6, 15). There is no support for that statement. Nowhere in its lengthy Memorandum Decision did the District Court make any such findings. The District Court simply noted in a footnote (A-65, f.n. 55) that Envirotech's equipment, as modified, did not have a *flat* baffle plate. The lower court went on to say that,

> "Even where a feed well design might have some form of bottom, flange, or base plate on the impeller shaft, the function of the base plate is *arguably* dissimilar to the Eis baffle. See generally Testimony of R. Emmett, Tr. at 728-749." (A-65, f.n. 55) (emphasis added).

This is a far cry from a finding of fact. It is a mere reference to argumentative testimony of one of Envirotech's employees—testimony contrary to that given by other Envirotech employees and Amstar's witnesses (A-115). Clearly, Envirotech's modified equipment has a substantially horizontal baffle means with blades on one surface (A-47). In accordance with basic principle of patent law stated above, it does not avoid infringement of claim 9 for that reason.

Envirotech did not argue to the Court of Appeals that footnote 55 was a finding of fact which could only be reversed if held to be "clearly erroneous". It ignored the entire point on appeal, and made other arguments as to why there was non-infringement. This element now is presented as one of over-riding importance only because Envirotech's other arguments were devastated by the Federal Circuit's decision. Envirotech should not be permitted to raise before this Court an argument abandoned below.

SUMMARY OF ARGUMENT

This case does not raise any important question of federal law which has not been settled by this Court; does not involve a decision on a federal question in a way in conflict with applicable decisions of this Court; and does not involve a conflict among the federal Courts of Appeal on the same matter. The case merely involves a litigant dissatisfied with a Court of Appeals' decision reversing a District Court's holding for readily apparent errors in construing the applicable law. There is no issue here worthy of the grant of a writ of certiorari. The questions presented in the Petition are interesting, but do not arise in this case.

There is no question but that the Court of Appeals applied the "clearly erroneous" standard of Rule 52(a) F.R.C.P. in reversing the District Court's fact findings on the issue of infringement. The trial court clearly misunderstood how to apply the law of patent infringement. In particular, it incorrectly held that Envirotech's later addition of elements to the claimed invention avoided infringement. It incorrectly held that Amstar was estopped to read the patent claims on the accused apparatus and process, under the doctrine of file wrapper estoppel. Its findings were limited to those theories. It did not properly apply the patent claims to the accused apparatus and process. Accordingly, the Court of Appeals found that the findings of fact which were made either were clearly erroneous or irrelevant. As the record before both the District Court and the Federal Circuit was full and complete, including testimony, exhibits and demonstrative evidence, and as infringement was clear on the record, the Federal Circuit held the patent infringed, and entered Judgment in Amstar's favor. That Judgment is clearly correct and will withstand close scrutiny by any court.[2]

---

2 The fact findings supporting the conclusion that the Eis patent is valid were not appealed. The Court of Appeals noted and approved these findings (A-2-4).

REASONS FOR DENYING THE WRIT

I. The Federal Circuit Applied The "Clearly Erroneous" Rule, As Properly Interpreted, In This Case And Has Regularly Applied The Rule In Other Cases.

Envirotech contends that the Federal Circuit has established a policy of deciding facts *de novo* in violation of the "clearly erroneous" standard of Rule 52(a) F.R.C.P. (Petition pp. 8-16). The Federal Circuit has no such policy. That Court applied no such policy in this case. Envirotech has raised a "straw man" issue to try to attract this Court's attention to a straightforward patent infringement action.

The Federal Circuit applied the "clearly erroneous" standard here in the manner in which that test ordinarily is applied by appellate courts. The Court began its opinion in this case as follows:

> "Though literal infringement of a properly interpreted claim is a fact question, its determination may be rendered *clearly erroneous* through an improper interpretation and application of the governing law. In that event, as here, the determination must be overturned as having resulted from error as a matter of law." (A-8) (emphasis added).

The Court went on to hold that as the District Court improperly construed the law of patent infringement, its fact findings to that end were either clearly erroneous or irrelevant.

Envirotech seeks to leave the impression that the Federal Circuit comprises a group of novice judges unfamiliar with their proper judicial role (Petition pp. 9, 13). To the contrary, that Court, as a whole, and especially the panel which sat in this case, consists of highly experienced federal jurists with particular expertise in the field of patent law. Envirotech's argument is specious that the panel "was especially ill-suited to appraise and weight the evidence here." (Petition p. 9). The

opinion was written by Chief Judge Markey, former Chief Judge of the Court of Customs and Patent Appeals (C.C.P.A.). The unanimous decision was joined by Judge Friedman, former Chief Judge of the Court of Claims, and by Judge Davis, Judge of the Court of Claims for more than twenty years.

The Federal Circuit was created by the Federal Court Improvement Act of 1982 for the purpose of consolidating patent appeals jurisdiction before one specialized court. It is well known that patent cases are lengthy, mainly dependent upon documentary evidence rather than upon credibility and veracity of fact witnesses, and usually deal with complex technology. Those attributes are true of this case as well.

To achieve its objective, Congress provided that judges of the C.C.P.A. and Court of Claims sit on the new Federal Circuit. These judges were known to have experience with both technology and patent law. The members of the Court have an intimate familiarity with Patent Office procedure and with chemical and metallurgical patent practice. They are more likely to spot errors of patent law than other Court of Appeals judges who have not had such experience. But, that does not lead to the conclusion that they have a policy of ignoring lower court fact findings.

The Federal Circuit judges are well aware of their role as appeals court judges. They realize that they are not triers of the facts. In many contemporaneous cases, they have spelled out their understanding of their function. In *Preemption Devices, Inc. v. Minnesota Mining & Mfg. Co.*, 732 F.2d 903, 905 (C.A.F.C. 1984), a panel which included Judge Davis said:

> "PDI raises on appeal each and every one of its five points and in its briefs asks us, in effect to review the entire record and reach our own conclusions on each point—in its favor, of course. This is not our function as an appellate court. Fed. R. Civ. P. 52(a) . . . . it behooved appellant, therefore, to precisely point out and demonstrate why the finding of the trial court, on any

> issue it argued, was *clearly* erroneous, not merely that we *might* reach a different conclusion on a de novo review."

The Federal Circuit has consistently adhered to that viewpoint. For typical applications by that Court of the "clearly erroneous" rule to patent infringement issues, see *Schenck A.G. v. Nortron Corp.*, 713 F.2d 782, 785 (C.A.F.C. 1983); *Caterpillar Tractor Co. v. Berco, S.p.A.*, 714 F.2d 1110, 1114 (C.A.F.C. 1983); *Thomas & Betts Corp. v. Litton Systems, Inc.*, 720 F.2d 1572, 1579 (C.A.F.C. 1983); *Raytheon Corp. v. Roper Corp.*, 724 F.2d 951, 956 (C.A.F.C. 1983); *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1578 (C.A.F.C. 1984). The Federal Circuit has brought a much needed uniformity to patent law by assessing findings of fact made by all U.S. District Judges in light of that rule and the superior knowledge and experience the Federal Circuit has in the field of patents.

There is no conflict in the application of the rule by the Federal Circuit and by other circuits, as Envirotech alleges (Petition p. 16), because all circuits apply the same rule. Several defendants who recently have lost cases by reversal in the Federal Circuit are trying to create an incorrect impression.[3] Some of those other cases had strong dissenting opinions; others involved special jury findings, novel issues of law, questions of intent or the weight to be accorded certain kinds of evidentiary facts. But, whatever the merits of petitions by other parties in other cases, the issue of whether the "clearly erroneous" rule must be applied is not properly present here. The rule was applied in this case.

Envirotech further contends that although the Federal Circuit mentioned the magic words "clearly erroneous," that Court did not properly apply the rule in this case (Petition p.

---

3 Indeed, the *Federal Judicial Workload Statistics* (period ending March 31, 1984) show that the Federal Circuit reversed only 9.9% of decisions (13.5% in appeals from district courts) compared with an average reversal rate in civil appeals of 18.2%.

14). It long has been the law that the rule applies only to findings of fact, and not to conclusions of law. In *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), this Court held:

> "The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis."

Although in *Pullman-Standard* this Court did not expressly decide whether mixed questions of law and fact are subject to the rule, it was noted:

> "There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court." *Id.* at 290 (f.n. 19).

Envirotech tries to take the position that infringement is purely a fact question (Petition p. 8). It dances around the point with the following *non-sequitor*:

> "A finding of infringement, whether literal or based on equivalent elements, is a determination of fact." (Petition p. 8).

By definition, of course, a finding is a determination of fact. But, the issue of infringement always has been a mixed question of law and fact. The cases cited by Envirotech (Petition p. 8) make that point very clearly. See *Winans v. Denmead*, 56 U.S. 330, 338 (1853); *Coupe v. Royer*, 155 U.S. 565, 579 (1895). The cited cases nowhere state that the issue of infringement is purely a question of fact.

The Federal Circuit has rigidly followed this Court's guidance in considering mixed questions of law and fact. Thus, in *SSIH Equipment, S.A. v. International Trade Commission*, 718 F.2d 365, 376 (C.A.F.C. 1983), cited by Envirotech for the nearly opposite proposition (Petition p. 8), the Court of Appeals said:

> "With respect to infringement, the question of "what is the thing patented" is one of *law*, while the question "has that thing been constructed [made], used or sold" by the alleged infringer is a *factual* issue . . . to be proved by a preponderance of the evidence." (emphasis added).

The Federal Circuit has consistently followed that view. See also *Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565, 1569 (C.A.F.C. 1983).

The Court of Appeals applied the test here. It determined that the District Court's infringement issue findings were clearly erroneous or irrelevant because the trial judge was led to a misunderstanding of the law of patent infringement (A-6, 8-9). Because infringement is a mixed question of law and fact, the Court of Appeals properly reversed the incorrect determination of non-infringement. The Federal Circuit was not bound to accept erroneous and irrelevant findings of fact, to the extent made by the lower court.

II. The District Court's Findings Of Fact Were Based On An Incorrect Interpretation Of The Law, And To The Extent Made, Were Held By The Federal Circuit To Be Irrelevant Or Clearly Erroneous.

The District Court did an essentially "flawless" job in mastering the complex technology of this patent infringement action (A-2). It made many findings supporting the validity of the Eis patent and Envirotech's surreptitious activities trying to discover how the invention worked. Where it ran into trouble was in misunderstanding the law of patent infringement. As explained by the Federal Circuit, the trial court was "[l]ed to the erroneous belief that Amstar had argued for patentability on the basis that Eis avoided all mechanical mixing anywhere in the system" (A-6). As a result of Envirotech's argument, the trial court believed that Amstar was estopped from reading the Eis patent claims on apparatus which utilized mechanical mixing.

As the Court of Appeals noted, Envirotech's non-infringement argument, which persuaded the district judge, was "in all charity, disingenuous." (A-14). And, its estoppel argument was "simply devoid of merit" (A-17). "[T]he District Court was clearly influenced by the effort of Envirotech to construct a fog of false estoppel" (A-16). These errors in law resulted in clearly erroneous findings of fact.

Further, the trial court found (correctly, but irrelevantly) that some of Envirotech's apparatus includes a mechanical mixer. It concluded (incorrectly) "under the apparent impression that infringement is avoided when an element of an accused device is not found in the claims" (A-6), that there was no infringement. This is an obvious error of patent law. The Court of Appeals commented:

> "That view would stand the law of infringement on its head, and would fatally undermine the long-established legal principle that non-infringement is shown when an element or step in the claims is missing from the accused product or process, not vice-versa." (A-13).

As Envirotech explains in its Petition (p. 4), "The District Court found that Envirotech did not infringe the Eis patent because the Envirotech equipment included an additional element [mechanical mixing] that is not used in the Amstar equipment." It is "hornbook law" that "modification by mere *addition* of elements or functions, whenever made, cannot negate infringement" (A-9). *Cochrane v. Deener*, 94 U.S. 780, 786 (1876). Because of its incorrect understanding of these principles of claim interpretation, the trial court's findings were irrelevant or clearly erroneous.

The District Court did not follow this Court's mandate that infringement is determined by examining the words of the patent claims together with the accused subject matter. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 607 (1950). In reversing, the Court of Appeals held:

> "The law of infringement requires that the asserted claims be compared with the products or processes accused of infringement. . . . This was not done here. On the contrary, in the seven pages of the Memorandum Decision devoted to the infringement issue, it is made clear that the District Court was led to take a wrong turn in determining the infringement issue." (A-8, 9).

Instead, the District Court found a lack of infringement by Envirotech because of:

a) the addition of an element (mechanical mixer) to the apparatus defined by the asserted claims;

b) the absence of an element (flared feedwell mouth) not recited in any asserted claim;

c) the modification of an element (a *flat* baffle plate into a baffle with blades) in a manner which is irrelevant to the asserted claims; and

d) the addition of elements (angled lamella plates) not mentioned in any claims. (A-65).

Even assuming *arguendo* that these findings regarding Envirotech's additions and modifications are factually correct, none avoid a holding of infringement. Consequently, as held by the Federal Circuit, "the determination must be overturned as having resulted from error as a matter of law." (A-8).

Envirotech repeatedly argues (Petition pp. 4, 5, 6, 15, f.n. 14) that the lower court also held non-infringement because it "found that the Envirotech equipment did not include an essential element required by the Eis patent, namely a baffle used to arrest and outwardly displace the incoming liquid." (p. 4). Nowhere in the District Court's Memorandum Decision does such a finding appear. There is only one record citation for the alleged finding—a footnote (A-65, f.n. 55). In that footnote to its Memorandum Decision, the District Court actually said that, "it is true that several Envirotech documents and drawings refer to use of a plate to disperse the feed . . . or

use a modified baffle plate design." It is clear that Envirotech's originally made and sold equipment did not avoid infringement on that ground.

The District Court went on in footnote 55 to say that, "Envirotech's later designs do not include *flat* baffle plates" and "[c]onsequently the equipment in question in this lawsuit does not use a *flat* baffle plate as described by the Eis claims." (emphasis added). The lower court is correct that Envirotechn's modified baffle plate is not *flat*. It is a unitary substantially horizontal plate or disc with blades on one surface. As Eis claim 9 does not require a *flat* baffle plate, this so-called finding is an irrelevant statement. Claim 9 refers only to "substantially horizontal baffle means". It is literally infringed. Process claims 1 and 8 do not even mention baffle means. They are infringed regardless of the apparatus used. *Cochrane*, *supra* 94 U.S. at 788. The trial court's determination to the contrary was clearly erroneous as based on an incorrect view of the law as applied to the facts of this case.

III. No Remand For Further Findings of Fact Was Necessary Because Infringement Was Clear On The Record.

Every time a district court decision is reversed, the case need not be sent back for further consideration by the lower court. As this Court held in *Pullman-Standard*, *supra* 456 U.S. at 292:

> "Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless* the record permits only one resolution of the factual issue." (emphasis added).

In this case, the Court of Appeals held that the evidence was essentially "unchallenged" and the documentary evidence "unequivocally" showed infringement (A-6, 11). No remand was necessary here.

A full record was presented at the trial. As pointed out by the Federal Circuit, the trial lasted seven days, the transcript

running over 1,150 pages. There were some 300 exhibits totaling over 4,000 pages (A-1). The District Court's Memorandum Decision was 66 pages in length, much of it devoted to a detailed technical analysis of the art, but only 7 pages to the infringement issue.

The essential material necessary for resolution of the infringement issue was reproduced in a lengthy Appendix (308 pages) and Exhibits (188 pages) submitted to the Court of Appeals. That Court did not need any further evidence or findings upon which to rest a holding of infringement. Of special assistance to the Court were claim charts in the trial record (PX 32) which were reproduced in Amstar's Appeal Brief and accompanied by the corresponding trial testimony. The Court of Appeals commented:

> "The District Court's Memorandum Decision overlooked the claim charts (Px 32) introduced and analyzed at trial and presented here as part of Amstar's brief on appeal. Those charts establish unequivocally that the accused apparatus employed at Envirotech's pilot plants, and as originally sold to Eagle Coal and Dock and to EFN, constituted literal infringements of claims 1, 8, and 9.
>
> The record further illustrates that the modifications assertedly made by Envirotech, whenever they may have been made, are either irrelevant or fail to escape infringement. The accused products, including those modified, are the same, they perform the same function in the same way, and they achieve, as the District Court found, the same result as the claimed inventions. See *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 41-42, 50 S.Ct. 9, 12-13, 74 L.Ed. 147, 3 U.S.P.Q. 40, 44 (1929).
>
> In this case, the merely colorable variations so vigorously pressed by Envirotech are of a kind with those described by the Supreme Court as fostering "the piracy" and consequent defeat of the disclosure purpose of the patent system. *Graver Tank*, *supra*, 339 U.S. at 607, 70 S. Ct. at 855, 85 U.S.P.Q. at 330. Infringement is clear on this record." (A-11-12).

Where infringement is as clear on the record as it is here, the Court of Appeals need not waste valuable judicial resources by sending the matter back for further consideration. This case has been pending for nearly six years. The patent has only a few years of life left. There is no question of veracity, intent, motive or the like which is so peculiarly within the realm of the trier of the facts to decide. The full facts are in the documentary record and substantially uncontroverted.[4] The District Court's Judgment was reversed principally for errors of law. There is no need for further evidence.[5] See *Jones v. Hardy*, 727 F.2d 1524, 1531 (C.A.F.C. 1984).

If the findings are sparse on the "baffle means" it is because Envirotech's argument of non-infringement now presented is entirely different than the one it previously made. On appeal, Envirotech did not brief the issue as to whether it continued to infringe by virtue of alleged removal or modification of the baffle means. Envirotech's approach was to support the District Court's erroneous interpretation of patent law. Envirotech argued that the *addition* of an element (the mechanical mixer) avoided infringement and that Amstar was estopped by file wrapper arguments from reading the Eis patent claims on the accused apparatus and process. The Court of Appeals addressed and refuted these legal arguments (A-13-17).

Envirotech did not make the argument it now makes—that there is either no baffle means or a modified one in its apparatus and process. Indeed, the Court of Appeals said:

---

4 Envirotech argues that the trial record contains a conflict in expert testimony (Petition p. 14). That conflict was due to one Envirotech employee's refusal to admit the obvious. No question of credibility or veracity arises. It was never resolved by the trial court and the Federal Circuit did not find a resolution necessary to a decision (A-12). Envirotech also argues that the record is unclear because drawings were made by witnesses at trial (Petition pp. 9-10, f.n. 9). Those drawings were made by Envirotech's employees or at the instance of its attorneys. If the record is unclear, it is their own fault.

5 The Federal Circuit did remand to the District Court for further findings on the issue of willful and deliberate nature of the infringement (A-10, f.n. 5).

> "The brief filed by Envirotech on this appeal, presented to assist this court in determining that the finding of non-infringement was not clearly erroneous, contains *not one* reference to any step of process claims 1 and 8, or to any element of product claim 9, that is even asserted to be absent from the accused processes and products of Envirotech." (A-12).

Having lost below on its argument, Envirotech is trying a new tact of relying upon an ambiguous footnote (A-65, f.n. 55) in the District Court's Memorandum Decision. The footnote is clearly erroneous, incorrect as a matter of law and provides no escape from infringement of apparatus claim 9 or process claims 1 and 8 of the Eis patent (A-10).

Envirotech has gone through the motions of filing a petition for writ of certiorari, not because there is any merit to its case, but only to put off the day of reckoning. Its petition raises no issue which warrants granting the writ sought.

CONCLUSION

Upon the facts and authorities stated above, it is respectfully submitted that Envirotech's petition for a writ of certiorari to the Court of Appeals for the Federal Circuit should be denied.

Respectfully submitted,

GERALD W. GRIFFIN
Counsel of Record
NORMAN H. ZIVIN
COOPER, DUNHAM, CLARK, GRIFFIN
& MORAN
30 Rockefeller Plaza
New York, New York 10112
(212) 977-9550

DONALD B. HOLBROOK
JONES, WALDO, HOLBROOK
& MCDONOUGH
170 South Main Street
Salt Lake City, Utah 84111
(801) 521-3200

Attorneys for Respondent
AMSTAR CORPORATION